

## BRITISH TAX REVIEW

use all their reasonable endeavours. Similarly, arguments that “regularly review” didn’t put a firm timescale down were rejected on the basis that the annual reporting would drive regular reviews. That report would, according to the Minister, be included in HMRC’s departmental report, meaning that it would be something the Public Accounts Committee and Treasury Committee would have oversight of. There was also a commitment to have an oversight group, along the lines of the Powers oversight forum, to watch over the use and development of the Charter.

### *Conclusion*

The proof of the Charter pudding will of course be the Charter itself, its launch and the way that all those involved with HMRC—its staff, tax advisers and taxpayers—use it. At least we have the legislative grounding, in an acceptable form, as a starting point. <sup>LT</sup>

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## **Section 93 and Schedule 46- duties of senior accounting officers of large companies**

### *The context*

Section 93 of and Schedule 46 to the Finance Act 2009 require senior accounting officers (SAOs) of certain large companies to take reasonable steps to ensure that their company establishes and maintains appropriate tax accounting arrangements. The provisions have attracted more attention than might be expected from such an innocuous sounding requirement, so much so that the clause was debated by the whole House of Commons rather than the Standing Committee.<sup>1</sup> Moreover, the House of Lords’ Select Committee on Economic Affairs issued a resounding reprimand to HMRC over the lack of consultation on this provision and on section 94 (Publishing details of deliberate tax defaulters) in its report on the Bill.<sup>2</sup>

This note seeks to examine briefly the background behind the requirement, and to analyse its purpose, rather than setting out the detailed requirements, which has been done very thoroughly elsewhere.<sup>3</sup> The legislation is backed up by an extensive guidance

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<sup>LT</sup> Charters; Revenue and Customs; Taxation administration

<sup>1</sup> Hansard, HC, (Session 2008–2009), Vol.492, col.863–887 (May 13, 2009) and Hansard, HC, Session 2008–2009, Vol.495, col.1052 and following (July 8, 2009).

<sup>2</sup> House of Lords, Select Committee on Economic Affairs, Third Report of Session 2008–09 *The Finance Bill 2009*, paras 35–42, available [via] [www.publications.parliament.uk/pa/ld200809/ldselect/ldeconaf/113/11305.htm](http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeconaf/113/11305.htm) (accessed October 21, 2009). Section 94 is discussed briefly in the introduction to this issue at page 491.

<sup>3</sup> The large accounting firms have issued guidance for their clients—see for example KPMG, *Accounting Officers Certification of Tax Accounting Arrangements—Are you ready?* Available at : [www.kpmg.co.uk/pubs/Schedule46\\_accessible.pdf](http://www.kpmg.co.uk/pubs/Schedule46_accessible.pdf) (accessed October 9, 2009); PwC, *Tax Transparency Update - Schedule 46 Finance Bill 2009*, available at: [www.pwc.co.uk/pdf/tax\\_transparency\\_update\\_flyer\\_june\\_2009.pdf](http://www.pwc.co.uk/pdf/tax_transparency_update_flyer_june_2009.pdf) (accessed October 9, 2009);

E. Dwan, T. Spillett and L. Sauvage, “Accurate Tax Reporting”, *The Tax Journal*, June 2, 2009, 10. See also the comments of various firms of solicitors at [www.lexology.com](http://www.lexology.com)— for example “Calling all

note on which there was some consultation (hereafter referred to as the Guidance Note).<sup>4</sup> Helpful though this is, there will be some who will question a provision that is said by HMRC simply to enact best practice, but which requires six pages of legislation and 20 pages of guidance. The guidance is not legally binding, of course, but provides very good insights into HMRC thinking.

There appears to be a widespread belief that this provision came “out of the blue” or was a response by HM Treasury to the April 2009 G20 summit decisions, and not an HMRC initiative.<sup>5</sup> Anyone watching the various documents emitting from HMRC on links with large businesses and tax risk management<sup>6</sup> and from the Organisation for Economic Co-operation and Development (OECD) Forum on Tax Administration<sup>7</sup> on the same topic, however, would not have been surprised by this development. There is an on-going pressure to elevate tax risk management to the level of decision makers such as the Chief Financial Officer (CFO), Chief Executive Officer (CEO) and the Audit Committee. The belief seems to be that they will be less inclined to engage in what the OECD and HMRC perceive to be “aggressive” tax planning than would in-house tax advisers left to their own devices. The OECD Study into the Role of Intermediaries, undertaken by a Study Team comprised of HMRC officials and the OECD Secretariat reported in 2008 that:

“In some countries, audit committees are now required to take responsibility for the oversight of the corporate tax function. This typically includes (i) which professional tax advisers to retain, (ii) what professional tax activities to outsource, and importantly (iii) developing and monitoring an appropriate overall tax-risk strategy.”<sup>8</sup>

It was, perhaps, only a matter of time before these ideas began to be adopted in the United Kingdom as a way of embedding tax risk management firmly into the wider corporate governance framework. In July 2009, the OECD Forum on Tax Administration published a note on best practice in corporate governance and tax risk management based on the experiences of Australia, Canada and Chile, suggesting that a good governance approach in relation to tax might include:

“Reporting requirements that ensure that significant tax risks are elevated to decision makers such as the CFO, CEO, The Board or its Audit Committee”.<sup>9</sup>

senior accounting officers: are you ready for your additional roles and responsibilities?”, C. Sallabank, October 11, 2009; A. Greenbank and A. Loan “Updated senior accounting officer briefing”, October 8, 2009.

<sup>4</sup> HMRC Guidance Note 17, *Duties of Senior Accounting Officers of Qualifying Companies*, August 2009, available at: [www.hmrc.gov.uk/largecompanies/duties-sen-acc-officer.pdf](http://www.hmrc.gov.uk/largecompanies/duties-sen-acc-officer.pdf) (Guidance Note) (accessed October 21, 2009).

<sup>5</sup> See, for example, Dwan, Spillett and Sauvage, fn.3.

<sup>6</sup> *Review of Links with Large Business* (HMRC, November 2006); *Making a Difference: Delivering the Review of Links with Large Business* (HMRC, March 2007); *HMRC Approach to Compliance Risk Management for Large Business* (HMRC, March 2007). This is discussed further in J. Freedman, G. Loomer and J. Vella, “Corporate Tax Risk and Tax Avoidance: New Approaches” [2009] BTR 74.

<sup>7</sup> *Study into the Role of Tax Intermediaries*, OECD 2008, available at: [www.oecd.org/dataoecd/28/34/39882938.pdf](http://www.oecd.org/dataoecd/28/34/39882938.pdf) (accessed October 9, 2009); *Forum on Tax Administration, General Administrative Principles: Corporate governance and tax risk management*, OECD, July 2009, available at: [www.oecd.org/dataoecd/37/19/43239887.pdf](http://www.oecd.org/dataoecd/37/19/43239887.pdf) (accessed October 9, 2009).

<sup>8</sup> *Study into the Role of Tax Intermediaries*, fn.7, at p.15.

<sup>9</sup> *General Administrative Principles: Corporate governance and tax risk management*, fn.7 at para.43.

## BRITISH TAX REVIEW

The new provisions for SAOs are entirely consistent with these indications of a trend; an idea that has been developing in tandem with the new regime for managing the tax risk of large companies more generally.<sup>10</sup> Thus the idea of requiring sign off for tax purposes from someone other than the tax director is not novel, unexpected or objectionable. The way in which this has been introduced in the United Kingdom and the details surrounding the requirements may be more of a problem.

### *Lack of consultation*

The House of Lords Select Committee accepted the views of their private sector witnesses that HMT and HMRC were at fault in failing to consult on these provisions. They stated that:

“We do not find persuasive the reasons put forward by officials why it was not possible to consult on these clauses. Our view is that with measures as novel and contentious as these, there should have been consultation on the principles as well as the practicalities of implementation. Even by their own criteria, we see this as a failing on the part of HMT and HMRC and we recommend that in the future there should be consultation on changes such as these. We hope that it will not be necessary to revert to this issue again in a future report.”<sup>11</sup>

In seeking to justify the introduction of the provision without consultation, the HMRC official in question stated that:

“...the Government had to take very difficult and urgent decisions on fiscal consolidation, and part and parcel of that is our decisions around maintaining tax revenues and tax compliance. That is why this decision was taken at the same time as the fiscal consolidation measures. The measure is aimed at a relatively small number of large groups, most of whom, the Government believes, will not be significantly impacted by it; but some that do not have adequate systems will be; and it was felt right not to delay action for those companies.”<sup>12</sup>

The witness went on to say that there was on-going consultation on the Guidance Note, but this did not satisfy the Committee. The willingness to impose an additional burden on all qualifying companies, most of whom, by HMRC's own admission, are already following good practice, in order to deal with a few groups without adequate systems, seems to be a key criticism. The risk management approach to dealing with large businesses was intended to ensure that Customer Relationship Managers (CRMs) would discover whether adequate systems were in place and allocate resources to companies accordingly.<sup>13</sup> It might have been thought that the failure to secure a low risk rating would have been enough to stimulate inquiries and action at Board level or alternatively action by HMRC under existing powers. If HMRC think they need additional powers does this

<sup>10</sup> See materials in fn.6.

<sup>11</sup> See fn.2 at para.42.

<sup>12</sup> Fn.2. Minutes of Evidence, J. Harra in reply to Q156, Lord Best: (June 1, 2009). Available at: [www.publications.parliament.uk/pa/ld200809/ldselect/ldconaf/113/9060103.htm](http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconaf/113/9060103.htm) (accessed October 21, 2009).

<sup>13</sup> See fn.6.

mean that the risk management approach is not working with an important minority of recalcitrant companies? Would it not have been more in accord with the approach of trust and co-operation set out in the *Review of Links with Large Business*<sup>14</sup> to focus on this minority rather than introducing new regulations for all?

*The key provisions*

The question of why it was thought necessary to enact a provision which requires SAOs to do something as basic as maintaining appropriate tax accounting arrangements, which might have been thought to be a fundamental requirement under existing law and audit requirements such as section 386 of the Companies Act 2006, was addressed in HMT's Explanatory Note to the Bill.<sup>15</sup> The problem targeted was that there was no legal obligation on any particular director or company officer to take personal responsibility for this. This provision remedies that specific absence of obligation by imposing a personal penalty on the named SAO. There is a penalty of £5,000 for failing to establish and monitor appropriate tax accounting and a further £5,000 for failure to provide a certificate within the prescribed timescales. The maximum penalty for any individual SAO is £10,000 in any financial year irrespective of the number of companies for which that individual is an SAO.<sup>16</sup> The duty to name the SAO is imposed on the company and the company is liable to a £5,000 penalty for failure to notify. Thus the monetary value of the penalty is not significant for most of those covered by the legislation, though no doubt it could mount up over a number of years. It is almost certainly the reputational effects that will be of more concern to any SAO and his or her company. HMRC has, however, made clear in the Guidance Note that the penalties under this provision are not relevant for the purposes of the so called "naming and shaming" provisions.<sup>17</sup>

The provisions apply only to SAOs of "qualifying companies". This was modified from "large" companies by amendment to the Bill, following pressure from critics. Qualifying companies are defined in paragraph 15 of Schedule 46. The definition covers only UK incorporated companies and the size requirements ensure that the companies covered are those which have a large business relationship with HMRC and therefore have a Client Relationship Manager.<sup>18</sup> This should mean that fewer than 2,000 companies are covered.<sup>19</sup> The Guidance Note makes it clear that the measure applies equally to those companies with a "low-risk" relationship with HMRC under the risk management arrangements already in place, despite the fact that the low-risk relationship is intended to facilitate a "lighter touch" in the case of such companies.<sup>20</sup> This must be right. It would be unacceptable to introduce a legal obligation that discriminated between low-risk companies and others, given that the risk rating is purely administrative and also a

<sup>14</sup> See fn.6.

<sup>15</sup> See HM Treasury, *Finance Bill 2009: Explanatory Notes* Clauses 91 to 126 (Volume 4 of 4) April 2009 available at: [www.hm-treasury.gov.uk/d/financebill09\\_envol4.pdf](http://www.hm-treasury.gov.uk/d/financebill09_envol4.pdf) (accessed October 21, 2009).

<sup>16</sup> Guidance Note fn. 4, Annex A.

<sup>17</sup> Section 94 FA 2009, discussed in the introduction to this issue at p.491.

<sup>18</sup> On the Large Business Service see [www.hmrc.gov.uk/lbo/index.htm](http://www.hmrc.gov.uk/lbo/index.htm). See also HMRC, *Tax Compliance Risk Manual*, available at [www.hmrc.gov.uk/manuals/tcrmanual/index.htm](http://www.hmrc.gov.uk/manuals/tcrmanual/index.htm) (both accessed October 9, 2009).

<sup>19</sup> Rt. Hon. S. Timms, *Hansard*, May 13 2009, fn.1, at col.884.

<sup>20</sup> Guidance Note fn.4, Annex A.

## BRITISH TAX REVIEW

relationship that can shift. The SAO provision is said in the Guidance Note to be entirely consistent with the Business Risk Review undertaken by the CRM and in fact emphasises its relevance, because the certificate provided by the SAO will be “an important factor to take into account but not the sole determinant of where the business sits on the compliance risk spectrum”.<sup>21</sup> Thus this is an extra requirement, but one which forms part of the overall risk rating process.

The duties set out in the legislation have been criticised as being too broadly described<sup>22</sup>; the requirement is to take “reasonable steps” to ensure that the company establishes “appropriate tax accounting arrangements.” Much weight is being placed on the Guidance Note to elucidate these very general requirements. Delegation is obviously permissible, but the SAO must be satisfied that competent delegates are appointed and that the right sorts of systems are in place. The Guidance Note is explicit that this legislation does not require Sarbanes-Oxley (SOX) type procedures, though companies that are required to be SOX compliant already may well find that part of their work has been done.<sup>23</sup> This appears to be a process-based test: for example, it is recognised in the Guidance Note that a judgment around a tax-sensitive decision may differ from that made by HMRC without that meaning that the tax accounting arrangements are “inappropriate”.<sup>24</sup> What is appropriate is no doubt for the courts to decide in due course, but it cannot be necessary for the taxpayer to agree with HMRC to satisfy this requirement—it is reassuring for SAOs that HMRC will not seek to argue to the contrary. The Guidance Note also states, however, that the decisions must be based on a “reasonable interpretation of accurate information in full knowledge of tax law and having taken appropriate advice”.<sup>25</sup> This is potentially a highly profitable development for tax professionals, since SAOs will now want the reassurance of advisers at the highest level in order to protect themselves, even in cases where previously they might have been satisfied with in-house advice. On the one hand this might mean that companies weigh their actions more carefully, which could be a good thing and is what HMRC might be hoping for. On the other, it may mean they engage in the same activities as they were doing previously but require the endorsement of a senior tax practitioner at every stage by way of insurance. Could it transpire that this encouragement to seek tax advice could lead to more rather than less tax planning?

Not surprisingly, qualifying companies are being offered reviews of their processes by the professional firms in order to ensure that they satisfy the new requirements.<sup>26</sup> The obligations imposed by the legislation apply in relation to financial years beginning on or after July 21, 2009, but any SAO who begins a review of the appropriateness of the tax

<sup>21</sup> Guidance Note fn.4, para.87.

<sup>22</sup> For example, D. Jetuah, “FDs lurch unto unknown” *Accountancy Age*, October 8, 2009.


<sup>23</sup> Guidance Note, fn.4 para.76. This is borne out by responses to survey of in-house tax departments undertaken over the summer of 2009: T. Lloyd, “2009 In-House Tax Survey” *The Tax Journal* September 28 2009, 5. Two thirds of those surveyed thought the SAO requirement would mean higher costs; those who dissented were those below the threshold and those with SOX controls already in place.

<sup>24</sup> Guidance Note, fn.4, para.63. That this is a process related measure is also suggested by the detailed examples in Annex B of the Guidance Note.

<sup>25</sup> Guidance Note, fn.4, para.63.

<sup>26</sup> See for example KPMG, Accounting Officers Certification of Tax Accounting Arrangements—Are you ready? Available at: [www.kpmg.co.uk/pubs/Schedule46\\_accessible.pdf](http://www.kpmg.co.uk/pubs/Schedule46_accessible.pdf) (accessed October 9, 2009); PwC, Tax Transparency Update - Schedule 46 Finance Bill 2009, available at: [www.pwc.co.uk/pdf/tax\\_transparency\\_update\\_flyer\\_june\\_2009.pdf](http://www.pwc.co.uk/pdf/tax_transparency_update_flyer_june_2009.pdf) (accessed October 9, 2009).

accounting arrangements in the first financial year immediately following the introduction of this measure will be treated as having taken “reasonable steps” in respect of that period.<sup>27</sup> This “light touch” applies only to that first year and so there is a clear incentive to undertake a thorough review during that time. It is hard to believe that this will not impose costs on businesses, though this may also bring benefits (to the businesses as well as to their advisers). According to a poll conducted by Deloitte,<sup>28</sup> many tax professionals believe that the SAO legislation will give them the resources and the opportunity to carry out transformational rather than merely compliance work in their tax department now or in the future. A Tax Journal Survey also found that some in-house tax departments thought that the requirement was a good idea as it would challenge their businesses to document systems and processes which could lead to the identification of potential cost savings. Other respondents disagreed, saying that the provision was pushing yet another burden on to the taxpayer.<sup>29</sup>

The jury is out, therefore, on whether this legislation will result in improved tax accounting arrangements and at what cost. The extent to which this new requirement benefits the Exchequer and other parties remains to be seen. 

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### **Sections 95–98 and Schedules 47–50: changes to HMRC’s information and inspection powers, power to obtain contact details for debtors and record-keeping**

#### *Introduction*


THIS group of sections and schedules has four purposes:

- (1) to amend (in some instances, merely by clarifying) the detail of the information and inspection regime instituted by Schedule 36 to the Finance Act 2008 (Schedule 36);
- (2) to extend HMRC’s powers in this area in various respects;
- (3) to create a new power for HMRC to obtain contact details for debtors; and
- (4) to elucidate the record-keeping obligations in relation to stamp duty land tax (SDLT) and certain other indirect taxes.<sup>1</sup>

<sup>27</sup> Guidance Note fn.4, para.45.

<sup>28</sup> The survey, conducted in October 2009, also found that of 137 senior finance and tax figures from leading UK businesses, 41 per cent of companies polled said they had so far done nothing to achieve compliance, despite the fact only eight per cent are completely comfortable that their organisation could provide the necessary sign off, given their current arrangements. 84 per cent of firms polled believed that it will cost at least £50,000 to achieve compliance with SAO legislation. Eleven per cent of firms think it will cost £250,000 or more. See [www.camagonline.co.uk/News/3206.aspx](http://www.camagonline.co.uk/News/3206.aspx) (accessed October 24, 2009).

<sup>29</sup> T. Lloyd, “2009 In-House Tax Survey”, fn.23.

 Companies; Consultation; Directors; Senior accounting officers; Penalties; Taxation administration; Tax avoidance

<sup>1</sup> The other relevant indirect taxes are aggregates levy, climate change levy and landfill tax.